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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 NICOLE IVETTE MEZA,

Case No. 2:19-cv-00230-GMN-PAL

8 Petitioner,

ORDER

9 v.

10 WARDEN NEVEN, *et al.*,

11 Respondents.

12 This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 comes before
13 the Court following petitioner's response to the order to show cause why the petition should not
14 be dismissed as untimely.

15 Petitioner challenges her state court judgment of conviction, pursuant to guilty plea, of
16 conspiracy to commit murder, murder with use of a deadly weapon, and robbery with use of a
17 deadly weapon in Clark County Case No. 285960-2. (ECF No. 1-1 at 2). Judgment of conviction
18 was entered on April 8, 2014.¹ Petitioner did not file a direct appeal. (*Id.* at 1). The state court
19 dockets do not reflect entry of any intervening judgment of conviction.²

20 On July 31, 2017, petitioner filed a petition for writ of habeas corpus in state court. The
21 state courts denied that petition as procedurally barred as it was filed well after the expiration of
22 the state statute of limitations. (*Id.* at 19-27). Remittitur on the Nevada Court of Appeals' order in
23 the state habeas matter issued on September 24, 2018. (*Id.* at 18). Thereafter, petitioner filed her
24 federal habeas petition on January 29, 2019. (*Id.* at 1).

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26 ¹ The Court previously identified the date of entry of judgment as March 7, 2014, in accordance with petitioner's
27 representation in her petition. However, following review of petitioner's criminal court docket and the state courts'
written findings, it is clear that the judgment of conviction was actually entered on April 8, 2014.

28 ² The docket in petitioner's criminal case may be accessed via
<https://www.clarkcountycourts.us/Portal/Home/Dashboard/29> (last accessed Apr. 19, 2019).

1 Under 28 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless otherwise
2 tolled, begins running from the latest of

3 (A) the date on which the judgment became final by the conclusion of direct
4 review or the expiration of the time for seeking such review;

5 (B) the date on which the impediment to filing an application created by
6 State action in violation of the Constitution or laws of the United States is removed,
if the applicant was prevented from filing by such State action;

7 (C) the date on which the constitutional right asserted was initially
8 recognized by the Supreme Court, if the right has been newly recognized by the
Supreme Court and made retroactively applicable to cases on collateral review; or

9 (D) the date on which the factual predicate of the claim or claims presented
10 could have been discovered through the exercise of due diligence.

11 28 U.S.C. § 2244(d)(1). “The time during which a properly filed application for State post-
12 conviction or other collateral review with respect to the pertinent judgment or claim is pending
13 shall not be counted toward any period of limitation under this section.” *Id.* § 2244(d)(2).

14 Because petitioner did not file a direct appeal, her conviction became final when the time
15 for filing a direct appeal expired, on May 8, 2014. The federal statute of limitations thus began to
16 run the following day, and absent a basis for tolling or other delayed accrual, expired a year later,
17 on May 8, 2015. Her state post-conviction petition, filed after the expiration of the federal statute
18 of limitations and, being denied as untimely, not “properly filed,” did not statutorily toll the
19 limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). The instant petition was filed
20 on or about January 29, 2019, more than three years and eight months after this date, and is
21 therefore untimely. (ECF No. 1-1 at 1).

22 Petitioner appears to argue her petition should be deemed timely due to a combination of
23 equitable tolling, discovery of new evidence, and new U.S. Supreme Court law.

24 To the extent petitioner asserts that *Miller v. Alabama*, 567 U.S. 460 (2012) renders her
25 petition timely, the argument is without merit.³ Even assuming *Miller*, and the case holding it
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28 ³ Although petitioner cites only *Miller*, the Court infers that she also meant to cite *Montgomery v. Louisiana*, -- U.S. --, 136 S. Ct. 718 (2016), which held that the law created by *Miller* was retroactively applicable on collateral review.

1 retroactively applicable on collateral review -- *Montgomery v. Louisiana*, -- U.S. --, 136 S. Ct. 718
2 (2016) -- could provide petitioner a basis for relief, the petition was filed more than a year after
3 the latest of these decisions. The petition cannot be deemed timely on the grounds of new
4 constitutional law.

5 Petitioner also asserts that she recently discovered evidence that her trial attorney was
6 suspended for conduct that occurred during the timeframe in which she was representing
7 petitioner. (ECF No. 4 at 1). However, the evidence petitioner offers does not support any
8 conclusion that her attorney's misconduct had anything to do with her representation of petitioner
9 or that she performed deficiently in petitioner's case. This is not therefore either newly discovered
10 evidence or a basis for equitable tolling.

11 Finally, petitioner asserts that she has faced "one hindrance after another," presumably
12 arguing she is entitled to equitable tolling. Equitable tolling is appropriate only if the petitioner
13 can show that: (1) he has been pursuing his rights diligently, and (2) some extraordinary
14 circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649
15 (2010). Equitable tolling is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th
16 Cir. 1999), and "the threshold necessary to trigger equitable tolling is very high, lest the exceptions
17 swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States*
18 *v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The petitioner ultimately has the burden of
19 proof on this "extraordinary exclusion." *Miranda*, 292 F.3d at 1065. She accordingly must
20 demonstrate a causal relationship between the extraordinary circumstance and the lateness of her
21 filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant v. Arizona*
22 *Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

23 The Ninth Circuit has "adopted the 'stop clock' approach to analyzing claims for equitable
24 tolling. "[T]he statute-of-limitations clock stops running when extraordinary circumstances first
25 arise, but the clock resumes running once the extraordinary circumstances have ended or when the
26 petitioner ceases to exercise reasonable diligence, whichever occurs earlier." *Luna v. Kernan*, 784
27 F.3d 640, 651 (9th Cir. 2015) (citing *Gibbs v. Legrand*, 767 F.3d 879, 891-92 (9th Cir. 2014)).

1 Petitioner asserts there have been many changes to the administration for the law library at
2 her institution, making it difficult for her to make appointments and work on her case. (ECF No.
3 4 at 2). But she is not specific as to when she encountered such difficulties or how exactly it
4 impeded preparation of her federal habeas petition. This vague and conclusory allegation therefore
5 does not support a claim of equitable tolling.

6 Petitioner also asserts that she twice moved for extensions of time to file her state habeas
7 petition, both of which were denied. She filed the first motion on March 31, 2015, and the state
8 court denied it on May 5, 2015. (ECF No. 4 at 2-3). On June 5, 2015, she filed another motion for
9 extension of time and claims she never received a response, although the state court record
10 indicates the motion was denied. (*Id.*) To the extent petitioner asserts that she is entitled to tolling
11 during the time she believed her second motion was pending in state court, the argument is without
12 merit. First, petitioner did not file the second motion until after the federal limitations period had
13 already expired. Second, even assuming petitioner never received a response to her second motion
14 for extension of time, she waited two years to eventually file her state habeas petition.⁴ Petitioner
15 cannot show she was diligent in waiting this length of time without ever following up on the status
16 of her request, particularly where she had filed her request on the heels of her another request for
17 extension of time being denied.

18 Finally, petitioner asserts her attorney did not provide her the entire file, and she still has
19 not received some of the files, which are contained on a C.D. that she cannot have at the institution.
20 (*Id.* at 4). Petitioner asserts that she filed a motion to compel production of the missing files, which
21 the state court denied on May 5, 2015. (ECF No. 1-1 at 4). The complete lack of a case file might,
22 under some circumstances, justify equitable tolling, *see Waldron-Ramsey v. Pacholke*, 556 F.3d
23 1008, 1013 (9th Cir. 2009); *Lott v. Mueller*, 304 F.3d 918, 924-25 (9th Cir. 2002), if “the hardship
24 caused by lack of access to his materials was an extraordinary circumstance that caused” the
25 untimely filing of his federal petition. *See Waldron-Ramsey*, 556 F.3d at 1013. Here, however,
26 petitioner has not alleged how the missing documents prevented the timely filing of her federal
27 petition. In particular, considering the claims asserted in the petition, which do not attack the

28 ⁴ Petitioner filed her state petition on July 31, 2017. (ECF No. 1-1 at 5).

1 voluntariness of the plea, and petitioner's disavowal of any claim actual innocence, it is difficult
2 for the Court to see how she may have been hindered in preparing her petition. Of course, it is
3 impossible to make this determination without further factual development. But the Court
4 concludes that further factual development is not needed in this case. Regardless of the impact not
5 having her complete file had on petitioner's ability to prepare her petition, petitioner has
6 completely failed to argue or demonstrate to the Court that she has been diligent. Petitioner waited
7 until the eve of the expiration of both the federal and state statutes of limitation to seek the
8 remainder of her file and then did nothing for more than two years after her efforts were denied
9 before filing her state petition. Even considering petitioner's belief that she had a pending motion
10 for extension of time in state court does not change this result, as the motion was filed after the
11 federal statute of limitations had already expired and had no bearing on the timeliness of her federal
12 petition at any rate. Because petitioner has made no specific assertions requiring further factual
13 development on this point, the Court concludes that she has failed to support a claim of equitable
14 tolling in this case.

15 In short, petitioner has not established an entitlement to equitable tolling, or made sufficient
16 allegations to require further development of her claim. The petition, filed nearly four years after
17 the expiration of the AEDPA statute of limitations, is therefore untimely and must be dismissed.


18 In accordance with the foregoing, IT IS THEREFORE ORDERED that the petition for writ
19 of habeas corpus in this case is dismissed with prejudice as untimely.

20 IT IS FURTHER ORDERED that petitioner is DENIED a certificate of appealability, as
21 jurists of reason would not find the court's dismissal of the petition as untimely to be debatable or
22 wrong.

23 The Clerk of Court shall enter final judgment accordingly and CLOSE this case.

24 IT IS SO ORDERED.

25 DATED THIS 22 day of April 2019.

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28 GLORIA M. NAVARRO
UNITED STATES DISTRICT JUDGE